

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

YVETTE GORZELANY, JOANNA
OBIEDZINSKI and PAULINA PAKOS,

Plaintiffs,

v.

SIMON & SCHUSTER, INC.; SIMON
SPOTLIGHT ENTERTAINMENT; JAY
LOUIS; CLUBITUP.COM; CLUB BLISS
and JOHN DO 1-100 and ABC/XYZ CO.
(fictitious names),

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-7775-08**

Civil Action

OPINION

Decided: February 6, 2009

Charles Ingenito on behalf of the Plaintiffs, Yvette Gorzelany,
Joanna Obiedzinski and Paulina Pakos (Festa & Ingenito, LLC).

Elizabeth A. McNamara admitted pro hac vice on behalf of
Defendants, Simon & Schuster, Inc., Simon Spotlight
Entertainment and Jay Louis (Davis Wright Tremaine LLP).

Steven C. Schechter appearing on behalf of the Defendant, Club
Bliss.

MENELAOS W. TOSKOS, J.S.C.

There is an inherent tension between defamation law and the First Amendment. Our courts have developed a number of privileges to preserve the vitality of public debate by immunizing various kinds of speech for defamation actions. One of these privileges concerns a statement of an opinion which is constitutionally protected. The purpose of this privilege is to allow comment on public issues. Our democracy encourages public debate. Therefore, defamation is the unprivileged publication of false communication which naturally and

proximately results in an injury. The contemporary law of defamation balances two competing social interests, protecting an individual's reputation and encouraging free and ultimate communication protected by the First Amendment.

Plaintiffs contend that the use of their photographs in the book Hot Chicks With Douchebags was defamatory. In lieu of filing an answer, the defendants Club Bliss, Simon & Schuster, Inc., Simon Spotlight Entertainment and Jay Louis filed motions to dismiss the complaint. These defendants moved for summary judgment arguing that the use of plaintiffs' photographs in the book was not defamatory to plaintiffs.¹

The facts appear to be undisputed. Plaintiffs attended Club Bliss on or around June 7, 2007. During this visit, their pictures were taken by a company known as Clubitup. Plaintiffs were not provided with nor did they request a consent/authorization form. Through Clubitup.com the author, defendant Jay Louis, came into possession of the photographs. They were used in a book entitled Hot Chicks With Douchebags which was published by Simon Spotlight (a division of Simon & Schuster). Plaintiffs Obiedzinski and Gorzelany appear in a single photograph on page 70 while plaintiff Pakos appears in a single photograph on page 180. Plaintiffs allege that their reputations suffered from these pictures being published in this book and also suffered other damages. In a defamation action such as this where the essential facts are not disputed, the summary judgment process is well suited. Kotlikoff, supra, 89 N.J. at 67.

The decision has to be made after consideration of the context in which the photographs appeared in the publication. Decker v. Princeton Packet, Inc., 116 N.J. 418, 425 (1989). The threshold question of whether a published picture represents a false statement of alleged fact and whether the picture is reasonably susceptible to a defamatory meaning are issues of law to be decided by the trial court. Romaine v. Kallinger, 109 N.J. 282, 290 (1988); Kotlikoff v. The

¹ At the time the motions were heard, Clubitup has not filed an answer or appeared.

Community News, 89 N.J. 62 (1982); Karnell v. Campbell, 206 N.J. Super. 81, 88-89 (A.D. 1985).

There is no libel where the material is susceptible of only a non-defamatory meaning and is clearly understood as being parody, satire, humor or fantasy. Salek v. Passaic Collegiate School, 255 N.J. Super. 355. The Court finds this decision instructive. In Salek, supra, the plaintiff teacher had her picture contained in the school yearbook for 1988. Her picture was contained in the section entitled “The Funny Pages” which had photographs accompanied by alleged humorous captions. One photograph depicted the plaintiff sitting next to another teacher who had his right hand raised to his forehead. Under the photograph, the caption read “Not tonight Ms. Salek. I have a headache.” The plaintiff argued that the import of the photograph was that Mr. DeVita, the other teacher, was declining her proposition to engage in sexual relations with him. Plaintiff presented a report from an expert news media analysis in which an opinion was given that the average reader of the yearbook would conclude that there was ongoing sexual relations between plaintiff and Mr. DeVita. The trial court dismissed on summary judgment and the Appellate Division affirmed. The Appellate Division agreed that it was for a trial court to determine whether the photograph “was reasonably susceptible of the defamatory meaning . . .” It also determined that it was not defamatory since it was a parody satire.

Plaintiff Salek then argued that dismissal of her defamation claim should not result in the dismissal of her other claims. The Appellate Division disagreed. The Court dismissed plaintiff’s other claims including light invasion of privacy, intentional and negligent infliction of emotional distress and negligent supervision. With regard to the claims for intentional and negligent infliction of emotional distress, the Court quoted from Decker, supra, 116 N.J. at 432:

“There is . . . a certain symmetry or parallel between claims of emotional distress and defamation that calls for consistent results. Thus, it comports with the First Amendment protections to deny an emotional distress claim based on a false publication that a gender’s no defamation per se.”

In light of these guidelines, the Court has carefully scrutinized the book and the context in which the photographs appear. On page 70 the title heading is “The Federbag”. It contains three paragraphs, all of which describe a type of male who the author considers a “douche celebrity.” He described a federbag as “famous in their own minds, they live the celebrity rock star life style while being neither celebrity nor rock star.” None of the paragraphs has anything to say about the plaintiffs in the photograph. With respect to the photograph depicting the plaintiff Pauline Pakos it is located on page 180 and comes under the title heading “Step 5: Leave New Jersey”. Under this heading the author describes why in his opinion leaving New Jersey is an essential step in “the de-douchification process” of a male. Again, nothing is mentioned about plaintiff Pakos any of the females depicted in the photographs contained in that chapter.

The book begins by defining a “douchebag” and including a definition which is not recognized in the dictionary. In fact, it appears to be one made up in order to be humorous. At the end of the book, in his acknowledgment, the author states “I must give a special round of thanks to all the participants and contributors on the blog whose enthusiasm and hilarious commentary mocking the douchescrote and celebrating the hott have kept me going.” On the rear cover there is a quote “Douchebags need a smack.” This quote is attributable to “Gandhi”.

The Court concludes that there is no actionable defamation. The book is replete with obvious attempts at satirical humor. For example, how can a person reasonably believe that in 1981 archaeologist Renee Emile Bellaqua uncovered in a cave in Gali Israel a highly controversial Third Century religious scroll suggesting that the “douchey/hotty” coupling was a

troublesome facet in early social religious structures? Or would a reasonable person believe that Jean-Paul Sartre stated “man is condemned to be douche because once thrown into the world he is responsible for every douche thing that he does”? Or that John Hopkins has a Department of Scrotology or that there was a Theban King Seqenenra Tag, in ancient Egypt known as “gito of the southern city”? An examination of the book reveals that old photographs of paintings are doctored to suit the satire in the book. The author also defines a completely fictitious time period “BG”, before the actor Richie Grieco and “AG” after the actor’s impact on the douchebag male style.

The Court finds that the text and photographs do not constitute defamatory falsehood of or concerning any of the plaintiffs. Instead the photographs in which the plaintiffs appear and the accompanying text are used for humorous social commentary. None of the plaintiffs are identified in the text or indeed in the entire book. There are no captions which describe anything within either of the photographs. Instead the photographs are used for a general depiction to support the commentary of the author. Consequently, no defamatory meaning can be imputed to plaintiff. Furthermore, since the text as a whole is not “of or concerning” plaintiffs, or susceptible to a defamatory meaning, the complaint as a matter of law is not defamatory and plaintiffs cannot by innuendo make it defamatory. Vogel v. Forbes, 500 F.Supp. 1081 (A.D. Pa. 1980); Shapiro v. Newsday, 5 Med.L.Rptr. 2007.

An examination of the entire publication compels the Court to conclude that a reasonable person would determine that the book Hot Chicks With Douchebags is intended to be satirical humor. While it may in some eyes be vulgar and tasteless, it definitely is not an assertion of fact that anyone would take seriously. Pring v. Penthouse International, 695 F.2d 438, 443 (10th Cir.

1982). Failing as an assertion of fact, the book must be treated as protected expression of opinion. Consequently, it is absolutely privileged under the First Amendment.

Although insults are offensive, they do not rise to the level of defamation. McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 312, 751 A.2d 1066 (App. Div.), certif. denied, 166 N.J. 606, 767 A.2d 484 (2000). “[O]nly verifiable statements can be defamatory.” Ibid. Thus, name-calling and opinions, which “cannot be prove[n] true or false, . . . are not actionable.” Ibid. Indeed, “opinion[s], as a matter of constitutional law, enjoy absolute immunity.” Dairy Stores, Inc. v. Sentinel Publ’g Co., 104 N.J. 125, 147, 516 A.2d 220 (1986). When there is no “settled meaning, the truth or falsity of an insult is not susceptible to . . . proof.” Lynch v. N.J. Educ. Ass’n, 161 N.J. 152, 167, 735 A.2d 1129 (1999). In other words, the reason that “expressions of pure opinion [are] non-actionable as defamation, is . . . [because] ideas themselves cannot be false.” Avins v. White, 627 F.2d 637, 642 (3d Cir.), cert. denied, 449 U.S. 982, 101 S.Ct. 398, 66 L.Ed.2d 244 (1980). The statement therefore is protected under the First Amendment. Nanavati v. Burdette Tomlin Mem’l Hosp., 645 F.Supp. 1217, 1248 (D.N.J. 1986), aff’d in part and rev’d in part, 857 F.2d 96 (3d Cir. 1988), cert. denied, 489 U.S. 1078, 109 S.Ct. 1528, 103, L.Ed.2d 834 (1989). Thus, recovery is appropriate only when there are “defamatory false averments of fact and the truth of the statement is a complete defense to a defamation action.” McLaughlin, supra, 331 N.J. Super. at 312, 751 A.2d 1066.

Tarus v. Borough of Pine Hill, 381 N.J. Super. 412, 427-428.

Even if the book was not absolutely privileged under the First Amendment, the Court nonetheless determines that Plaintiffs’ complaint must be dismissed as they have not met their burden with respect to each of the eight counts alleged therein.

Count one alleges a claim for intentional infliction of emotional distress. To sustain this claim, plaintiffs must allege outrageous intentional conduct by the defendant, “so extreme in degree, as to go beyond all possible bounds of decency” and that plaintiffs’ ensuing emotional distress was “so severe that no reasonable [person] could be expected to endure it.” Buckley v. Trenton Savings Fund SOC, 111 N.J. 335, 366 (1988). Here, it is clear that the defendants’ conduct in publishing photographs of plaintiffs posing for the camera, does not meet this standard. There is nothing inherently offensive about the photographs. Certainly, a reasonable person would not conclude that they exceeded the bounds of decency. Accordingly, plaintiffs

cannot sustain a claim for intentional infliction of emotional distress and the count must be dismissed.

In count two, plaintiffs allege a claim for negligent infliction of emotional distress. In order to sustain this claim, plaintiffs must allege actual malice based upon an allegedly negligent publication. Walko v. Kean College of New Jersey, 235 N.J. Super. 139, 151 (Law Div. 1988). To satisfy this standard, plaintiffs must prove that the defendants knew of the falsity of the allegations at the time published or that they subjectively and actually entertained doubts as to the truth of the allegations. New York Times v. Sullivan, 376 U.S. 254 (1964). Here, the plaintiffs cannot show falsity because the statements published by the defendants constitute opinion. Accordingly, plaintiffs cannot sustain a cause of action for negligent infliction of emotional distress.

In counts three and six, plaintiffs plead claims for conspiracy to commit fraud. In order to sustain this cause of action, plaintiffs must point to facts which demonstrate a knowing falsehood or misrepresentation as to an existing fact made with the intention that the other person relies thereon and that person's reliance and consequent damage. Banco Popular No. America v. Gandi, 184 N.J. 161, 172-73 (2005). In addition, R. 4:5-8(a) requires that the specific facts and particulars of the wrong, with dates and particulars of the false statements made, and reliance taken thereon, must be pleaded with specificity. Here, there is no false statement or reasonable reliance alleged by the plaintiffs. Accordingly, plaintiffs cannot sustain their claims for conspiracy to commit fraud.

In count four, plaintiffs allege an invasion of privacy claim. Invasion of privacy occurs when "the matters revealed were actually private, that dissemination of such facts would be offensive to a reasonable person, and that there is no legitimate interest of the public in being

apprised of the facts publicized.” Romaine, *supra*, 109 N.J. at 297. In order to be considered “private,” the plaintiff must allege publication of “facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to his close friends.” Restatement (Second) of Torts § 652D cmt. B (1977). Here, the photographs were taken at Club Bliss which is a public establishment. Therefore, the photographs cannot be considered private as “an individual cannot expect to have a constitutionally protected privacy interest in matters that are exposed to public view” and “no person can have a reasonable expectation of privacy in his appearance.” Doe v. Poritz, 142 N.J. 1, 80 (1995). In addition, even if the photographs were private, a reasonable person would not find their publication offensive because there is nothing offensive about the photos published in the book or about the fact that plaintiff attended a night club. See Bisbee v. John C. Conover Agency, Inc., 186 N.J. Super. 335, 340 (App.Div. 1982). Accordingly, plaintiffs have not established an invasion of privacy claim and this count must be dismissed.

In count five, plaintiffs assert a cause of action for unfair competition under a non-existent New Jersey statute described as the “Business & Professions Code Section 17200.” To support a claim for unfair competition, the plaintiff must allege a business activity with which defendants unfairly competed. Clearly plaintiffs are not engaging in a business activity. Where the activity is non-commercial in nature, there can be no unfair competition. Furthermore, the fact that “books, newspapers, and magazines are sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.” Time, Inc. v. Hill, 385 U.S. 397 (1967). The “commercial nature of an enterprise does not introduce a nonspeech element or relax the scrutiny required by the First Amendment.” Olivia N. v. National Broad. Co., 126 Cal. App. 3d 433, 493 (Ct.App. 1981). Accordingly, there is no basis to sustain a cause

of action for unfair competition because the activity complained about is non-commercial in nature.

In count seven, plaintiffs state a cause of action for defamation. To support this claim, plaintiffs must allege that the defendants (1) made a defamatory statement of fact (2) of and concerning plaintiffs (3) which was false. Feggans v. Billington, 291 N.J. Super. 382, 391 (App.Div. 1996). Plaintiffs herein have not established any of the requisite elements for defamation. First, because the statements contained within the book are opinions, they cannot be construed as false statements of fact. Second, the statements do not specifically mention, identify, or in any other way relate to the plaintiffs. As such, they cannot be deemed to be of and concerning the plaintiffs. Third, there is nothing in the record to support a claim of falsity. Accordingly, plaintiffs have not established a prima facie case for defamation and this count must be dismissed.

In count eight, plaintiffs allege a claim for “humiliation.” This cause of action is not recognized in New Jersey. It is plausible that this count could be construed as an emotional distress claim. However, as set forth above in greater detail, plaintiffs have not supported the requisite elements to support a claim for emotional distress. Accordingly, count eight must be dismissed as it is a non-viable claim.

For the reasons set forth in this Opinion, the Court grants the motions of the defendants for summary judgment as to the moving defendants and the complaint is dismissed with prejudice.